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Supreme Court, U.S.
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NO. 84-768

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

ALLSTATE INS. COMPANY, ARGONAUT INS. COMPANY, HARLEYSVILLE INS. COMPANY, OHIO CASUALTY GROUP OF INS. COMPANIES, ROYAL INS. COMPANY, SUN COMPANY, INC., TRAVELERS INS. COMPANY and WAUSAU INS. COMPANIES,

Appellants/Objecting Members of Defendant Class,

vs.

RICHARD BAKSALARY, WILLIAM JONES, MORRIS TUCKER, CHARLES SAMUEL, Individually and on behalf of all others similarly situated,

Appellees/Plaintiffs,

and

PAUL J. SMITH, C. JOHN URLING, JR., WILLIAM J. SHEPPARD, GRACE M. SLOAN, THE STATE WORKMEN'S INSURANCE FUND, PENNSYLVANIA MANUFACTURERS ASSOC. INS. COMPANY, AMERICAN MUTUAL LIABILITY INS. COMPANY, THE SCHOOL DISTRICT OF PHILADELPHIA, BITUMINOUS CASUALTY CORP. and all other insurance carriers and/or self-insured employers similarly situated,

Defendants/Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

MOTION TO DISMISS OR AFFIRM

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Appellants/Objecting Members of Defendant Class,

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RICHARD BAKSALARY, WILLIAM JONES, MORRIS TUCKER, CHARLES SAMUEL, Individually and on behalf of all others similarly situated,

Appellees/Plaintiffs,

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PAUL J. SMITH, C. JOHN URLING, JR., WILLIAM J. SHEPPARD, GRACE M. SLOAN, THE STATE WORKMEN'S INSURANCE FUND, PENNSYLVANIA MANUFACTURERS ASSOC. INS. COMPANY, AMERICAN MUTUAL LIABILITY INS. COMPANY, THE SCHOOL DISTRICT OF PHILADELPHIA, BITUMINOUS CASUALTY CORP. and all other insurance carriers and/or self-insured employers similarly situated,

Defendants/Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

MOTION TO DISMISS OR AFFIRM

Appellees, class plaintiffs and prevailing parties below, respectfully move the Court pursuant to Rule 16 to dismiss the appeal in this case for want of jurisdiction, Rule 16.1(a), or alternatively, to summarily affirm the judgment below on the ground that the questions presented are so unsubstantial, in light of the factual findings of the district court and its application of the governing legal precepts, as not to warrant any further argument. Rule 16.1(c).

OPINIONS BELOW

The liability opinion of the three-judge district court is reported at 579 F. Supp. 218 (E.D. Pa. 1984); that opinion and the court's accompanying order are reproduced in the Appendix to the Jurisdictional Statement at 36a - 83a (hereafter "App. at ___"). The district court's subsequent opinion approving a classwide Consent Decree and resolving, in plaintiffs' favor, a single unsettled issue, is reported at 591 F. Supp. 1279 (E.D. Pa. 1984); that opinion and the court's implementing orders are reproduced at App. 1a - 35a.

STATEMENT OF THE CASE

This is a direct appeal filed by eight members of a defendant class of insurance carriers and self-insured employers from an order of a three-judge district court approving a comprehensive Consent Decree that settled the remedial issues in this lawsuit which successfully challenged the constitutionality of the "automatic supersedeas" provision of section 413(a) of Pennsylvania's Workmen's Compensation Act, Pa. Stat. Ann. tit. 77, § 774 (Purdon Supp. 1984). 1/

The complaint was filed on February 13, 1976 in the United States District Court for the Eastern District of Pennsylvania. Plaintiffs claimed that section 413(a)'s automatic supersedeas procedure denied them due process of law by authorizing insurance carriers and self-insured employers to terminate the payment of their workers' compensation benefits -- including the termination of both compensation checks and incurred medical expenses -- without any notice or opportunity to be heard.

1/ The automatic supersedeas procedure challenged by plaintiffs is contained in the first sentence of the fourth paragraph of section 413(a). It provides:

> The filing of a petition to terminate or modify a notice of compensation payable or a compensation agreement or award as provided in this section shall operate as a supersedeas, and shall suspend the payment of compensation fixed in the agreement or by the award, in whole or to such extent as the facts alleged in the petition would, if proved, require only when such petition alleges that the employe has returned to work at his prior or increased earnings or where the employe has fully recovered and is accompanied by an affidavit of a physician on a form prescribed by the [Bureau of Workers' Compensation] to that effect which is based upon an examination made within fifteen days of the filing of the petition.

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Pursuant to 28 U.S.C. § 2281, 2/ a special three-judge district court was convened to consider and determine the merits of plaintiffs' claims. 3/ In 1978, on plaintiffs' motion, the court entered an order under Rule 23(b)(2) of the Federal Rules of Civil Procedure permitting the action to proceed as both a plaintiffs' and defendants' class action. On the plaintiffs' side, the class was defined to include all persons whose benefits had been terminated, or whose benefits were in the future terminated, under section 413(a)'s automatic supersedeas procedure. On the defendants' side, the class was defined to include all insurance carriers and self-insured employers authorized to issue workers' compensation insurance in Pennsylvania and which terminated the payment of plaintiffs' benefits, or did so in the future, under the automatic supersedeas procedure contained in section 413(a).

Following a lengthy period of discovery, the parties submitted the case to the three-judge court through a comprehensive series of factual stipulations and accompanying exhibits. 4/

2/ Subsequent to the filing of the complaint in this case, Congress repealed section 2281. See Pub. L. 94-381, 90 Stat. 1119. However, as noted by the district court (App. at 2a), section 2281 still applies to cases filed before its repeal. Accord Cabell v. Chavez-Salido, 454 U.S. 432, 435 n. 5 (1982), Vitek v. Jones, 445 U.S. 480, 485 n. 4 (1980).

3/ The members of the court initially included the Honorable Arlin M. Adams, Circuit Judge of the United States Court of Appeals for the Third Circuit, the Honorable Herbert A. Fogel and the Honorable Clifford Scott Green, District Judges of the United States District Court for the Eastern District of Pennsylvania. In 1978, the Honorable Louis H. Pollak was assigned the case to replace Judge Fogel who had left the bench.

4/ These stipulations were executed and submitted by the named parties and an intervening defendant, Liberty Mutual Insurance Company. The named plaintiffs originally included six workers whose benefits had been terminated under section 413(a)'s automatic supersedeas procedure. Two of these plaintiffs were subsequently dismissed from the case by stipulation. The named defendants included four state officials responsible for the administration of Pennsylvania's Workmen's Compensation Act, as well as three state-licensed insurance carriers, one self-insured public school district, and the statutorily created and state-run State Workmen's Insurance Fund -- each of which had terminated plaintiffs' benefits under the automatic supersedeas procedure of section 413(a).

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After reviewing the record and considering the briefs and oral argument of counsel, the court issued its liability opinion on February 1, 1984. It concluded that:

> [the] operation of the automatic supersedeas authorized by section 413 of the Pennsylvania Workmen's Compensation Act involves conduct reasonably attributable to the state and that section 413 does not accord worker's compensation recipients due process.

App. at 71a - 72a. 579 F. Supp. at 233. 5/

After the liability opinion was issued, the parties submitted proposed forms of injunctive orders, as well as supporting briefs, for the district court's consideration. In those submissions, all parties recognized that, at a minimum, a declaratory judgment was necessary to implement the court's constitutional holding. Consequently, on March 15, 1984 a declaratory judgment was issued by the court with an accompanying memorandum opinion. App. at 91a - 101a. Oral argument was then scheduled on the remaining remedial issues raised by the parties in their proposed injunctive decrees.

On the day set for oral argument, the named parties agreed in principle to the entry of a Consent Decree that was intended to fully settle the litigation. They so advised the court, which granted them leave to draft the language of the Decree and secure the approval of their respective clients.

5/ The district court's opinion was written by Judge Pollak who was joined by both Judges Adams and Green. In addition, Judge Adams wrote a concurring opinion in which he highlighted the due process deficiencies of the automatic supersedeas procedure. App. at 73a - 81a. 579 F. Supp. at 233-237. Judges Pollak and Green joined in the concurring opinion of Judge Adams.

On April 27, 1984, the named parties (including intervening defendart Liberty Mutual Insurance Company) submitted a proposed Consent Decree to the district court with a joint motion for its preliminary approval. That Decree embodied the parties' intention to settle finally and in full all the remedial issues in the case save one. 6/ By order of May 14, 1984, the district court preliminarily approved the proposed Decree and authorized the transmission of extensive notice packages to all known members of both the plaintiff and defendant classes.

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, the district court afforded class members until June 13, 1984 to submit written comments or objections to the proposed Consent Decree. 7/ It also scheduled a "fairness hearing" for June 18, 1984 to consider the remarks and objections of the named and class parties.

At the fairness hearing, a relatively small number of objectors appeared and made oral presentations in opposition to the Consent Decree. In addition, several defendants interposed objections to the relief sought by plaintiffs for class members whose benefits had been terminated under the automatic supersedeas

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6/ That one issue involved the question of the relief to be afforded members of the plaintiff class whose benefits had been terminated under section 413(a)'s automatic supersedeas procedure between the issuance of the Court's February 1, 1984 liability opinion and its declaratory judgment of March 15, 1984. Since the named defendants represented to the district court that they had not so terminated any member of the plaintiff class, they did not believe it was appropriate to take a position, one way or the other, on that issue. Consequently, the parties agreed to submit that question to the court for disposition, but only after notice and an opportunity to be heard was provided the unnamed members of the defendant class.

7/ The district court also afforded the non-named members of the defendant class until June 13, 1984 to comment on or object to the relief sought by plaintiffs on behalf of workers whose benefits had been terminated under the automatic supersedeas procedure between February 1 and March 15, 1984. That question represented the unsettled issue which the parties had agreed to submit for a litigated judgment. See n. 6 supra.

procedure in the period February 1 to March 15, 1984. [8] After its consideration of those objections, and the responses of the named parties to them, the court took the case under advisement. [9]

On July 30, 1984 the district court filed an opinion and accompanying order in which it granted final approval to the Consent Decree, as well as granting plaintiffs the relief they had sought for class members whose benefits had been terminated in the February 1 - March 15, 1984 period. App. at 1a - 32a. [10] 591 F. Supp. 1280 et seq. Subsequently, appellants filed two

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8/ Appellants were among the several class defendants who filed Appearances in the district court after receiving notice of the Consent Decree. App. at 135a - 136a; 144a - 147a. While five of them submitted written objections to the Decree (App. at 137a - 143a), all eight appeared through the same counsel and objected to the settlement at the fairness hearing. None, however, sought to intervene as a defendant, nor did any of them ever move the district court to reconsider or vacate its constitutional ruling.

9/ In response to a question raised at the fairness hearing by several unnamed members of the defendant class as to whether the Consent Decree entitled any plaintiff who had returned to work without a loss of earnings to the simultaneous receipt of both compensation payments and wages, plaintiffs indicated that no such result was contemplated or intended by the Decree. Subsequent to the fairness hearing, a written statement to that effect was submitted by the named parties and one unnamed defendant class member. App. at 18a - 19a. That statement was adopted by the district court in its opinion granting approval to the Consent Decree. Id.

10/ An order amending the July 30, 1984 opinion was issued by the district court on August 13, 1984. App. at 33a - 35a.

notices of appeal from the order approving the Consent Decree, one to this Court and one to the United States Court of Appeals for the Third Circuit. 11/

11/ Initially appellants sought a stay of the Consent Decree from the district court pending disposition of their appeals to the Third Circuit and this Court. By order filed on September 24, 1984, the district court denied that motion.

In the Court of Appeals, appellants moved not for a stay of the Consent Decree, but rather for a stay of proceedings in that court pending disposition of the jurisdictional issue by this Court. On October 29, 1984 an order granting a stay of proceedings was issued by the Third Circuit. However, on October 23, 1984 -- while their motion for a stay of proceedings was still pending -- appellants filed their brief on the merits in the Circuit Court. That brief was addressed solely to the propriety of the district court's constitutional holding of February 1, 1984. Since appellants had failed in their brief to address the one issue on which the Court of Appeals had jurisdiction, i.e. the propriety of the order approving the Consent Decree, plaintiffs moved the Third Circuit to strike appellants' brief and dismiss their appeal. By order dated November 26, 1984, the Court of Appeals denied the motion to strike and deferred the motion to dismiss to the merits panel of the court. The motion to dismiss is still pending.

ARGUMENT

I. THE COURT LACKS JURISDICTION OVER THIS APPEAL

The sole issue presented by appellants in both this Court and the Third Circuit relates to whether the district court correctly held the automatic supersedeas procedure of section 413(a) to be unconstitutional. That issue, however, can neither be raised here nor in the circuit court since the litigation terminated with a court-approved Consent Decree to which appellants, as certified members of the defendant class, are bound. 12/ Moreover, appellants failed to appropriately raise the constitutional issue in the district court, by motion for reconsideration or otherwise. Consequently, the only permissible issue that appellants can raise on appeal, and even then they must raise it in the first instance in the Court of Appeals under 28 U.S.C. § 1291, is whether the district court abused its discretion, or misapplied governing legal precepts, in approving the Consent Decree. Carson v. American Brands, Inc., 450 U.S. 79 (1981). See also Blum v. Yaretsky, 457 U.S. 991, 1007 n. 17 (1982), Walsh v. Great Atlantic & Pacific Tea Co., Inc., 726 F.2d 956, 965 (3d Cir. 1983), Armstrong v. Board of School Directors, 616 F.2d 305, 313 (7th Cir. 1980), Patterson v. Stovall, 528 F.2d 108, 114 (7th Cir. 1976).

12/ See, e.g., Sam Fox Publishing Co. v. United States, 366 U.S. 683, 691-693 (1961) and Hansberry v. Lee, 311 U.S. 32, 41-43 (1940), respectively holding that members of a defendant class are bound by a Consent Decree (Sam Fox Publishing Co.) or litigated judgment (Hansberry) so long as they are adequately represented by the named defendants. Here, appellants have never challenged, nor could they, the adequacy of representation afforded them by the named defendants.

The very reason why litigants enter into settlements, by Consent Decree or otherwise, is to avoid a judicial determination of the merits of the underlying controversy. Carson v. American Brands, Inc., supra, 450 U.S. at 86-87, United States v. Armour & Co., 402 U.S. 673, 681 (1971). They do so because settlements avoid the time, expense and risk associated with further litigation. Id. For that reason, this Court, and the federal courts of appeals, have repeatedly refused to consider the merits of the underlying controversy on appeal of a district court order approving a settlement. Carson v. American Brands, Inc., supra, Swift v. United States, 276 U.S. 311, 324 (1928), Armstrong v. Board of School Directors, supra, 616 F.2d at 315, Patterson v. Stovall, supra, 528 F.2d at 114 ("[i]n determining whether to approve the compromise or not, the court does not try out the disputed issues. The compromise was agreed to for the purpose of avoiding just that").

If parties to a Consent Decree were permitted to appeal the merits of the underlying controversy, there would be no point in settling cases at all. Certainly there would be no point to settling, or even having class actions, if class members could choose, at their own discretion, to accept or reject a court-approved settlement. But Rule 23 was designed specifically to ensure that all class members would be bound, in a properly certified class action, to the resulting judgment of the court. See, e.g., Cooper v. Federal Reserve Bank of Richmond, 104 S. Ct. 2794, 2799 (1984), Califano v. Yamasaki, 442 U.S. 682, 700-701 (1979), Sosna v. Iowa, 419 U.S. 393, 403 (1975). A contrary conclusion would represent a return to the practice of "one-way" intervention, a practice explicitly abjured by the 1966 amendments to Rule 23. See Advisory Committee Note on Rule 23, 39 F.R.D. 98, 105 (1966). See also Developments in the Law - Class Actions, 89 Harv. L. Rev. 1318, 1340-1341 (1976).

These are not the only adverse consequences that would follow if appellants were permitted to directly appeal the district court's liability holding. Others would include a frustration of the judicial preference in favor of class action settlements, especially those affecting, as this one does, the public interest. See generally Airline Stewards & Stewardesses Assoc. v. T.W.A., 630 F.2d 1164, 1166-1167 (7th Cir. 1980), aff'd. sub nom. Zipes v. T.W.A., 455 U.S. 385 (1982), Armstrong v. Board of School Directors, supra, 616 F.2d at 312-313. Moreover, since this lawsuit was brought and certified under Rule 23(b)(2), the Rule by its terms, as well as through judicial construction, does not permit appellants to "opt-out" of the litigation as would be true in a Rule 23(b)(3) class. Walsh v. Great Atlantic & Pacific Tea Co., Inc., supra, 726 F.2d at 962-963, Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239, 248-250 (3d Cir.), cert. denied, 421 U.S. 1011 (1975). Cf. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) (Rule 23(b)(3) class members must be afforded notice in order to permit them the right to opt-out of the suit). Finally, permitting appellants the right to appeal would frustrate the very reason why the parties negotiated and executed, and the district court approved, the settlement in this case: to avoid the risks of further litigation and to "finally and in full" settle all class claims which were or could have been raised in this litigation. Consent Decree, at ¶ 1 (App. at 113a). See also Opinion approving the Consent Decree, App. at 13a - 14a, 591 F. Supp. at 1285.

* * *

Since the merits of the district court's constitutional ruling cannot properly be raised on appeal, the Court lacks subject matter jurisdiction over the merits of the case. Just last Term, in Heckler v. Edwards, 104 S. Ct. 1532 (1984), the Court unanimously held that direct review does not lie under 28 U.S.C. § 1252 when the issue on appeal only involves the

district court's remedy order, not its underlying constitutional adjudication. Id., at 1541. In that instance, an appeal lies directly to the appropriate circuit court under 28 U.S.C. § 1291.

Appellants here seek to invoke the Court's mandatory jurisdiction under 28 U.S.C. § 1253, the companion to 28 U.S.C. § 1252. But they can no more do so than could the appellants in Heckler. Section 1253, like section 1252, has always been narrowly construed, Gonzales v. Automatic Employees Credit Union, 419 U.S. 90, 98 (1974), and restricted to those few cases where the three-judge district court's constitutional ruling was properly at issue. See, e.g., Gerstein v. Coe, 417 U.S. 279 (1974) (no jurisdiction under § 1253 over appeals from declaratory judgments); MTM, Inc. v. Baxley, 420 U.S. 799 (1975) (no jurisdiction under § 1253 over appeals from abstention orders); Gonzales, supra (no jurisdiction under § 1253 over appeals from orders dismissing complaints on standing grounds). This construction of the statute comports with congressional intent and is consistent with the "common sense view that the constitutional holding must be at issue for direct review in this Court to lie." Heckler, 104 S. Ct. at 1538. See also MTM, Inc., supra, 420 U.S. at 804 (same as to § 1253). 13/

The constitutional holding of the district court not properly being presented in this case, the only basis for invoking the Court's jurisdiction under section 1253 is therefore lacking.

13/ Moreover, construing sections 1252 and 1253 in tandem is consistent with the Court's practice of treating all its direct appeal statutes in the same manner. See Tushnet, The Mandatory Jurisdiction of the Supreme Court - Some Recent Developments, 46 U. Cinn. L. Rev. 347, 351 (1977).

For that reason, the Court must dismiss this appeal. 14/

II. ALTERNATIVELY, THE COURT SHOULD SUMMARILY AFFIRM THE JUDGMENT BELOW

If, despite the foregoing, the Court concludes that it has jurisdiction over this appeal, it should nonetheless summarily affirm the judgment below. At this level of analysis, the Court need not consider whether the district court committed legal error or abused its discretion in approving the Consent Decree or resolving the unsettled issue in plaintiffs' favor. For, as noted in the margin, n. 14, appellants do not contend in their Jurisdictional Statement that the settlement itself is unfair, inadequate or unreasonable or that the district court erred in ordering the reinstatement and resumption of benefits to plaintiff class members whose workers' compensation payments were terminated after issuance of the February 1, 1984 liability opinion. In any event, no such contention could validly be advanced. 15/

This leaves for analysis the correctness of the district court's constitutional holding. However, based on the unchallenged findings of fact made below, and the district court's application of this Court's governing precedents, it is manifest that the questions presented by appellants are so insubstantial as to be inappropriate for review here.

14/ Even if the Court did have jurisdiction to consider an appeal of the district court's order approving the Consent Decree or that portion of its order resolving the unsettled issue in plaintiffs' favor -- and no such jurisdiction exists under section 1253 -- the appeal would still have to be dismissed for the fundamental reason that neither of those two issues has been presented for review in appellants' Jurisdictional Statement. Not having been presented, they must be deemed to have been waived.

15/ The district court applied the traditional standards of fairness, adequacy and reasonableness in assessing and ultimately approving the merits of the Consent Decree. App. at 10a - 26a, 591 F. Supp. at 1284-1290. In resolving the unsettled remedy issue, the district court applied the three-factor test for nonretroactivity enunciated by this Court in Chevron Oil Company v. Huson, 404 U.S. 97 (1971), and concluded that its remedy for these plaintiff class members should be retroactive to February 1, 1984 -- the date of its liability opinion. App. at 26a - 29a, 591 F. Supp. at 1290-1291.

A. THE DISTRICT COURT CORRECTLY FOUND THAT PLAINTIFFS-APPELLEES HAVE A STATE-CREATED PROPERTY INTEREST IN THE CONTINUED RECEIPT OF BENEFITS

At the outset, appellants assert that a due process analysis is inapplicable to this case since Pennsylvania does not consider entitlement to workers' compensation benefits to be a fundamental right. Jurisdictional Statement at 6-7. This, of course, "misconceives the nature of the issue and is refuted by prior decisions." Goss v. Lopez, 419 U.S. 565, 572 (1975). The issue is not whether plaintiffs-appellees have a fundamental right to benefits, but whether, under Pennsylvania law, they have a state-created property interest in the continued receipt of benefits which cannot be deprived without due process of law.

Property interests generally do not derive from the Constitution. Rather, they stem from some independent source such as state law, in the form of statutes or rules entitling citizens to certain benefits. Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982), Parratt v. Taylor, 451 U.S. 527, 529 n. 1 (1981), Goss v. Lopez, 419 U.S. at 572, Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Whether or not a particular state-created entitlement rises to the level of a property right is a matter of federal constitutional law. Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1, 9 (1978).

The underlying purpose of the Fourteenth Amendment's procedural protection of property is to "safeguard . . . the security of interests that a person has already acquired in specific benefits." Roth, supra, 408 U.S. at 576. Thus, this Court has often held that recipients of statutorily created public benefits have a property interest in the continued receipt of those benefits which may not be deprived, even on an

interim basis, without some form of due process protection. Matthews v. Eldridge, 424 U.S. 319 (1976) (social security disability benefits), Goss v. Lopez, supra (public education), Goldberg v. Kelly, 397 U.S. 254 (1970) (public assistance benefits).

In light of the foregoing, the district court had little difficulty in finding a constitutionally cognizable property interest in plaintiffs' continued receipt of workers' compensation benefits. App. at 50a - 53a, 579 F. Supp. at 224-225. In fact, the court found no distinction, for purposes of Fourteenth Amendment analysis, between the federal disability benefits at issue in Matthews, and the state disability benefits involved here.

The district court's judgment was clearly correct. Pennsylvania, by statute, has created a property interest in plaintiffs' continued receipt of workers' compensation benefits once eligibility has been established by either agreement of the parties or award by the state administrative authorities. That eligibility continues until or unless there is some subsequent agreement between the parties or award of the compensation authorities suspending or terminating eligibility. See § 413(b) of the Workmen's Compensation Act, Pa. Stat. Ann. tit. 77, § 774.1 (Purdon Supp. 1984). Appellants have conceded as much. Jurisdictional Statement at 3. Moreover, the burden is on the employer or insurance carrier to prove, by clear and convincing evidence, that a claimant has undergone a change in status so as to entitle it to a termination of benefits. Dale Manufacturing Co. v. Bressi, 491 Pa. 493, 421 A.2d 653 (1980), Romanski v. Workmen's Compensation Appeal Board, 33 Pa. Commw.

273, 381 A.2d 508 (1978). 16/

Workers' compensation benefits, in other words, are not a privilege which can be unilaterally withdrawn at the whim of the employer. They may only be terminated "for cause." See Logan, supra, 455 U.S. at 430, Memphis Light, supra, 436 U.S. at 11. This alone is sufficient to require that workers' compensation benefits be characterized as property for purposes of the Fourteenth Amendment. Even more compelling, however, is the fact that the Pennsylvania courts have recognized workers' compensation benefits as a form of property. Congleton v. Department of Public Welfare, 48 Pa. Commw. 615, 617, n. 2, 409 A.2d 1382, 1383, n. 2 (1980) ("we find no merit in appellant's argument that a pending workmen's compensation claim is not property"), Sayre v. Textile Machine Works, 129 Pa. Super. 520, 523, 195 A. 786, 788 (1938) (". . . compensation payments . . . are intended as a substitute for wages which the employee would have earned if he had not been injured"). See also Kelmon v. Reiber, 161 Pa. Super. 169, 53 A.2d 903 (1947) and Keller v. Old Lycoming Township, 286 Pa. Super. 339, 348 n. 6, 428 A.2d 1358, 1363 n. 6 (1981). So clear is the law on this point that throughout the eight years consumed by this litigation, no defendant has ever challenged the status of workers' compensation benefits as

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16/ It should be noted that workers' compensation benefits are a statutory substitute for two well recognized property interests -- wages, Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), and a cause of action against the employer for work-related injuries. Keller, supra. See Logan, supra (cause of action is a species of property protected by the Fourteenth Amendment). See also Martinez v. California, 444 U.S. 277, 281-282 (1980) (state tort claim arguably a species of property protected by the Fourteenth Amendment). It is inconceivable that Pennsylvania intended to attach less significance to the benefits with which it replaced these interests, than it did to the interests themselves.

constitutionally protected property. 17/

B. THE DISTRICT COURT CORRECTLY FOUND STATE ACTION AS A RESULT OF PENNSYLVANIA'S DIRECT RESPONSIBILITY AND INVOLVEMENT IN THE AUTOMATIC SUPERSEDEAS PROCESS

After extensive fact-finding (App. at 58a - 69a, 579 F. Supp. at 227-232), the district court held that Pennsylvania was intimately and directly responsible and involved in the automatic termination of plaintiffs' workers' compensation benefits (App. at 71a, 579 F. Supp. at 233). Appellants do not and cannot challenge those findings as clearly erroneous under Rule 52(a) of the Federal Rules of Civil Procedure.

Nor, contrary to appellants' hyperbolic suggestion, does the district court's holding represent a "significant and unwarranted extension" of the state action principles enunciated by this Court in Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982). See Jurisdictional Statement at 20. To the contrary, the district court's holding was logically compelled by Lugar given the exclusive state-created nature of the automatic supersedeas procedure and the direct participation by Pennsylvania in the termination of plaintiffs' benefits.

17/ Appellants' alternative argument that if a property interest exists at all, it is deserving of less protection than would be the case in "life-threatening or welfare-requiring situations", Jurisdictional Statement at 7, is misplaced. Whether or not due process attaches to a particular deprivation depends not on the weight, but rather the nature of the interest at stake. Goss v. Lopez, supra, 419 U.S. at 575. If the interest is not de minimus, "its gravity is irrelevant to the question whether account must be taken of the Due Process Clause." Id., at 576. See also Board of Regents v. Roth, supra, 408 U.S. at 570, Sniadach v. Family Finance Corp., supra, 395 U.S. at 342. Here, the district court specifically found that plaintiffs' interest in the continued receipt of workers' compensation benefits was not de minimus. App. at 51a - 53a, 579 F. Supp. at 224-225. In fact, it found further that the termination of benefits represented a significant, and frequently irreplaceable, loss of income to plaintiffs. App. at 53a, 579 F. Supp. at 225. Accord Board of Regents v. Roth, 408 U.S. at 577 ("[i]t is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined").

In accordance with Lugar, the district court conducted a dual inquiry. First, it inquired into whether the deprivation was "caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state [was] responsible." Secondly, it analyzed whether "the party charged with the deprivation [was] a person who may fairly be said to be a state actor." App. at 58a, 579 F. Supp. at 227, et seq.

1. The Automatic Supersedeas Procedure Is A State-Created Right Or Privilege

The automatic supersedeas provision of section 413(a) provided not only the right to terminate workers' compensation benefits without notice or an opportunity to be heard; it also created the exclusive procedure by which that right was to be exercised. Leaseway Systems v. Workmen's Compensation Appeal Board, 53 Pa. Commw. 520, 418 A.2d 796 (1980). The district court found that in the absence of that state-created mechanism, no defendant could have legally terminated benefits without a referee's adjudication or the consent of the claimant. App. at 60a, 579 F. Supp. at 228. See also § 413(b), 77 P.S. § 774.1 (Purdon's Supp. 1984). Appellants have conceded this point. Jurisdictional Statement at 3. There is thus no reason for this Court to review the district court's conclusion that the automatic supersedeas procedure constituted "the exercise of some right or privilege created by the state." App. at 59a, 579 F. Supp. at 228. 18/

18/ In addition to Lugar, the district court's conclusion is further supported by a consistent line of cases holding that similar state-created ex parte procedures were invalid under the Due Process Clause. See, e.g., North Georgia Finishing, Inc. v. Di-Chem, 419 U.S. 601 (1975), Fuentes v. Shevin, 407 U.S. 67 (1972), Sniadach v. Family Finance Corp., supra. Implicit in each of those cases, of course, was a finding of state action. Lugar, supra, 457 U.S. at 933.

2. The District Court Correctly Found That The Invocation Of The Automatic Supersedeas Procedure By Any Carrier, Public Or Private, Was Action Properly Attributable To The State

Having concluded that the automatic supersedeas procedure satisfied the first prong of the Lugar test, the district court went on to find that the "fair attribution" prong had been satisfied as well. At the outset, there can be no question that when the alleged violator of constitutionally protected rights is either a state or local governmental entity, the state action requirement is a fortiori satisfied. See, e.g., Lugar, supra, 457 U.S. at 928 et seq., Parratt v. Taylor, supra, Flagg Brothers v. Brooks, Inc., 436 U.S. 149, 157 n. 5 (1978). The district court properly recognized that under such circumstances, where the official character of the actor "lend[s] the weight of the State to his decisions", the two prongs of the Lugar analysis collapse into one. App. at 62a, 579 F. Supp. at 229, citing Lugar, supra, 457 U.S. at 937. Thus, the district court was unquestionably correct in concluding that self-insured public employers were state actors when they invoked the automatic supersedeas against plaintiffs. App. at 61a - 62a, 579 F. Supp. at 229.

Appellants do not seriously challenge that ruling. Nor can they rationally challenge the district court's finding of state action in the context of public or private employers insured by the State Workmen's Insurance Fund (hereafter "SWIF"). App. at 62a - 64a, 579 F. Supp. at 229-230. SWIF, a state agency, is required to ensure all employers who cannot obtain workers' compensation on their own or any other employer that chooses to be insured by it. By statute, SWIF, like any other insurance carrier, is the "duly authorized agent" for every employer it insures. § 401, Pa. Stat. Ann. tit. 77, § 701, as amended,

February 8, 1972, P.L. 25, No. 12, § 3 (Purdon Supp. 1984). By subscribing to SWIF, each of these employers becomes a member of that organization, "administered by officers and employees of the State as an agency of the State." SWIF v. Pittsburgh Coal Corp., 332 Pa. 201, 206-207, 2 A.2d 704, 706 (1938). Moreover, the district court found that each of SWIF's employees and officers are "for all purposes whatsoever [ ] officers and employees of the Commonwealth of Pennsylvania." App. at 63a, 579 F. Supp. 229-230, citing Pa. Stat. Ann. tit. 77, § 381, Act of April 20, 1921, P.L. 195, § 1 (Purdon 1952). Thus, it appropriately found that "when SWIF acts, for either public or private employers, the state acts." App. at 64a, 579 F. Supp. at 230. 19/

Appellants' state action argument, therefore, principally focuses on the district court's characterization of private insurers and self-insured private employers as state actors when they invoked the automatic supersedeas provision of section 413(a). Their private character, appellants argue, insulates them from any responsibility under the Fourteenth Amendment. This Court has consistently held however, and reiterated in Lugar, "that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor'". Lugar, 457 U.S. at 941. In this context, the district court noted that joint participation with the state "[does not require] something more than invoking the aid of state officials to take advantage of state created attachment procedures." App. at 67a, 579 F. Supp. at 231, quoting Lugar, supra, 457 U.S. at 942. Accord

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19/ SWIF stipulated at trial that it insured approximately 20,000 Pennsylvania employers under section 401 of the Workmen's Compensation Act. See Class Stipulations of Fact, at ¶ 23.

Adickes v. S. H. Kress & Co., 398 U.S. 144, 152 (1970), United States v. Price, 383 U.S. 787, 794 (1966). See also North Georgia Finishing, Inc. v. Di-Chem, supra, Fuentes v. Shevin, supra.

As was the case in Lugar, the Commonwealth of Pennsylvania directly involved itself, its Bureau of Workers' Compensation ("the Bureau") and the Bureau's employees in the supersedeas process. It did so by creating the exclusive method by which benefits could be automatically suspended. Under state law, the failure to adhere to that proscribed method subjects insurance carriers and self-insured employers to statutory penalties. See Section 435(a), as amended by Act of Feb. 8, 1972, P.L. 25, Pa. Stat. Ann. tit. 77, § 991(d)(i) (Purdon Supp. 1984). See also § 131.34, Pa. Bull., Vol. 11, No. 45, Nov. 7, 1981. 20/

Termination under section 413(a) could only be accomplished through the "filing" with the Bureau of a form petition which it provided. App. at 67a, 578 F. Supp. at 231. See also Federal Insurance Co. v. Areias, 680 F.2d 962, 964 (3d Cir. 1982), Workmen's Compensation Appeal Board v. Leuschen, 21 Pa. Commw. 39, 342 A.2d 810 (1975). The Bureau processed and reviewed the petition to ensure that it complied with the Workmen's Compensation Act and its own rules and regulations.

20/ In addition, as a result of the 1974 amendments to the Workmen's Compensation Act, Pennsylvania has made coverage under the Act mandatory for all employers and employees in the Commonwealth. No employer or employee, whether "public" or "private", may opt out of coverage without incurring criminal liability. See section 303(a), as amended by Act of December 5, 1974, P.L. 782, Pa. Stat. Ann. tit. 77, § 481(a) (Purdon Supp. 1984).

Only if the petition passed muster under those standards, was the supersedeas allowed to take effect. In that case, it was the Bureau itself, not the insurer, which notified the worker that his or her benefits had been terminated. If, however, the Bureau determined that the petition or the accompanying documents were defective, they were rejected and returned by the Bureau to the insurer or self-insured employer with instructions for correction. 21/ Where a defect was found, the Bureau notified the petitioning party of its continuing obligation to make payments of compensation.

Moreover, the statutory scheme created by section 413(a) provided unique advantages and benefits for those insurers or self-insured employers who invoked the automatic supersedeas provision. Thus, if employers or insurers did not take an automatic supersedeas when the allegations of their termination petition made a supersdedas appropriate, they could not subsequently obtain reimbursement from the Supersedeas Fund for any alleged overpayment of benefits. Department of Labor and Industry v. Workmen's Compensation Appeal Board, 58 Pa. Commw.. 413, 427 A.2d 1277 (1981).

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Based upon the cumulative impact of the preceding findings of fact, and its application of this Court's governing precedents, the district court reached the unavoidable conclusion that the Commonwealth of Pennsylvania was an essential participant in the automatic supersedeas process -- a process

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21/ Thus, the district court correctly noted that Blum v. Yaretsky is not to the contrary. There, no state action was found since the state never reviewed the challenged transfer decision in any way, and had no authority to approve or deny it. The contrary is true in Baksalary.

"legitimized" by legislation and lacking in a common law counterpart. The joint participation between and among the insurance carriers, the employers and the Commonwealth of Pennsylvania in order to effect a deprivation of workers' compensation benefits was, as the district court held, "sufficient to subject private invocation of the automatic supersedeas to the due process clause." App. at 68a - 69a, 579 F. Supp. at 232.

C. THE DISTRICT COURT CORRECTLY HELD THE AUTOMATIC SUPERSEDEAS PROCEDURE TO BE A VIOLATION OF PLAINTIFFS' RIGHTS TO DUE PROCESS OF LAW

The district court held the automatic supersedeas procedure to be constitutionally defective in two respects: first, section 413(a) provided no notice at all to plaintiffs prior to the termination of their benefits, 22/ and second, it offered them no opportunity to challenge that termination until many months after it had already taken effect. 23/ See App. at 70a - 71a, 579 F. Supp. at 232-233; see also concurring opinion of Judge Adams, App. at 73a - 81a, 579 F. Supp. at 233-237.

The district court's holding represented a mainstream decision consistent with a well-settled line of precedent from this Court. Under that precedent, "due process [ordinarily] requires an opportunity for 'some kind of hearing' prior to the deprivation of a significant property interest." Memphis Light, Gas & Water Division v. Craft, supra, 436 U.S. at 19, citing

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22/ Notice of the termination, as pointed out supra at 21, was provided by the Bureau of Workers' Compensation, not by individual insurers or employers. Even then, the Bureau's notification was sent subsequent to the actual termination of benefits. App. at 71a, 579 F. Supp. at 233.

23/ Frequently, as found by the district court, benefits were terminated for more than a year prior to a referee's decision on the merits. App. at 52a, 579 F. Supp. at 224.

Boddie v. Connecticut, 401 U.S. 371, 379 (1971). See also Logan v. Zimmerman Brush Co., supra, 455 U.S. at 437, Parratt v. Taylor, supra, 451 U.S. at 540 (1981). Likewise, notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action" is constitutionally required prior to deprivation of a protected property interest. Memphis Light, Gas & Water Co., supra, 436 U.S. at 13. See also Fuentes v. Shevin, supra, 407 U.S. at 80, Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313-314 (1950). 24/

The Court has applied these principles to invalidate on due process grounds a host of state laws that failed to provide any notice or opportunity to be heard before the deprivation occurred. See, e.g., Goldberg v. Kelly (public assistance), Sniadach v. Family Finance Corp. (wages), Bell v. Burson, 402 U.S. 535 (1971) (driver's license), Fuentes v. Shevin (personal property), Memphis Light, Gas & Water Division v. Craft (utilities), Connell v. Higginbotham, 403 U.S. 207 (1971) (public employment) and Goss v. Lopez (public education). These cases, and the due process principles enunciated in them, apply to interim deprivations of property as well as final deprivations. See, e.g., Arizona v. California, 460 U.S. 605, 638 n. 28, (1983), Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980), Sniadach v. Family Finance Corp., supra, 395 U.S. at 340 et seq., Fuentes v. Shevin, supra, 407 U.S. at 84-85.

24/ A departure from these principles of prior notice and hearing has only been justified in "extraordinary situations." Boddie v. Connecticut, supra, 401 U.S. at 379. These situations have been limited to cases involving public health emergencies, North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908), bank failures, Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1928) and considerations brought on by war. Bowles v. Willingham, 321 U.S. 503 (1944).

This case, of course, does not involve any such exigency. Nor have appellants contended otherwise.

The question in this case is not, as appellants mistakenly suggest, the nature of the process that is due, for the issue here is far more fundamental: the automatic supersedeas procedure at issue here is unconstitutional on its face, as held by the district court, since it provides no process or notice of any kind. Not being a form of process case like Matthews v. Eldridge, appellants' reliance on the balancing of interests test enunciated there is obviously misplaced.

Similarly misplaced is appellants' claim that due process only applies to "life-threatening or welfare-requiring situations." Jurisdictional Statement at 7. That argument again misconceives the constitutional distinction between the nature of the process that is due in a particular case or whether process is due at all. Goss v. Lopez, supra, 419 U.S. at 575. It is now well-settled that due process applies to not just the "necessities of life" but requires instead "an opportunity for [some kind of] hearing before a deprivation of [any] property takes effect." Fuentes v. Shevin, supra, 407 U.S. at 88. See also id. at 89: "While Sniadach and Goldberg emphasized the special importance of wages and welfare benefits, they did not convert that emphasis into a new and more limited constitutional doctrine."

To assert, as appellants do, that due process is satisfied by requiring a worker to submit to a medical examination by one of their own doctors is to ignore the most "elementary and fundamental requirements of due process." Memphis Light, Gas & Water Co., supra, 436 U.S. at 13. For, as the Court has repeatedly held, one of the critical elements of any due process proceeding is that a person whose rights are to be affected is entitled to be heard by an impartial decision-maker. See, e.g., Schweiker v. McClure, 456 U.S. 188 (1982), Marshall v. Jerrico, Inc., 446 U.S. 238 (1980).

It is clear, then, that the doctor's visit relied upon by appellants has no constitutional significance. The claimant is notified to appear for a medical examination, not a proceeding to defend his or her continued right to receive worker's compensation benefits. At the time of the visit, there is no proceeding to terminate benefits pending against the worker, thus it is inappropriate to suggest that he or she should come to the examination prepared to defend against a possible termination petition which may or may not be filed some time in the future. Furthermore, the doctor is not the decision-maker in charge of determining whether a termination petition will be filed, and whether an automatic supersedeas will be sought. In addition, the doctor's association with the insurance company undermines the fundamental necessity of impartiality. As Judge Adams so aptly observed in his concurrence: "the use of the unchecked recommendation of a physician in the employ of an interested party to terminate a benefit in which a recipient has a cognizable property interest is at odds with the due process concepts set forth in Matthews and Goldberg." App. at 81a, 579 F. Supp. at 237. Such a process is not conducive to determining the validity, or at least the probable validity of the underlying claim. Fuentes v. Shevin, supra, 407 U.S. at 83, Sniadach v. Family Finance Corp., supra, 395 U.S. at 343 (Harlan, J., concurring), and thus is unconstitutional.

Finally, appellants have misrepresented to the Court both the nature of the district court's holding of unconstitutionality as it applies to plaintiffs who have returned to work as well as the Consent Decree's disposition of those cases. In neither context did the district court or the parties contemplate that an individual who returned to work with no loss of earnings would simultaneously be entitled to receive both the

payment of compensation and salary. A statement to that effect was submitted to the lower court and its approval of the Consent Decree was specifically predicated on that statement. App. at 18a - 20a, 591 F. Supp. at 1287-1288.

Moreover, with respect to the district court's liability opinion, return-to-work claimants were properly included within the scope of its constitutional holding. First, none of these plaintiffs received any prior notice of the termination of his or her benefits. Second, section 413(a)'s automatic supersedeas procedure made no distinction between plaintiffs who returned to work permanently and those who were forced to leave their jobs again due to their work-related injury. In the latter situation, all benefits remained terminated, no matter how brief the return to work, pending a referee's decision on the merits of the underlying termination petition. Third and last, in all return-to-work cases where an automatic supersedeas was invoked, the payment of medical expenses incurred as a result of the work-related injury were terminated. These deficiencies led the district court, quite properly, to invalidate in toto the automatic supersedeas procedure of section 413(a).

CONCLUSION

For the reasons stated, named and class appellees respectfully move the Court to either dismiss the appeal for want of jurisdiction or, in the alternative, to summarily affirm the constitutional adjudication of the three-judge district court.

Respectfully submitted,

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